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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MIGUEL ALVAREZ-MEZA, Defendant.	Criminal Case No. 08CR0246-JM DATE: August 15, 2008 TIME: 11 a.m. Honorable Jeffrey T. Miller Courtroom 16 GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S DEPORTATION MOTION

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Steven De Salvo, Assistant U.S. Attorney, and hereby files its Response and Opposition to the Defendant's motion to dismiss the indictment on grounds that the prior deportation was invalid. Said motion is based upon the files and records of this case together with the attached statement of facts and memorandum of points and authorities.

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I

STATEMENT OF FACTS

On January 6, 2008, Miguel Alvarez-Meza ("Defendant") attempted to enter the Tecate Port of Entry while driving a passenger in a white 1992 Chevy van. Defendant presented a California driver's license in the name of "Gabriel Cruz" and he claimed to be a U.S. citizen. At secondary inspection, officers determined that Defendant had been previously deported on November 5, 1996, following a conviction on July 9, 1996 that, in two counts, he had sex with a minor, in violation of Cal. Penal Code Section 261.5(c), for which he was sentenced to 180 days and 170 days in county jail on the counts.

Defendant was charged with False Claim of U.S. Citizenship, in violation of 18 U.S.C. Section 911, and Attempted Re-Entry after Deportation, in violation of 8 U.S.C. Section 1326. On March 25, 2008, Defendant pleaded guilty to the Section 911 charge. The Section 1326 case is pending.

II

POINTS AND AUTHORITIES

A. DEFENDANT HAS FAILED TO ESTABLISH THAT HIS PRIOR DEPORTATION IS INVALID

Defendant argues that his 1996 deportation is invalid because: (1) the Immigration Judge failed to obtain a valid waiver of his right to attorney, and (2) this error caused prejudice because he had a "plausible" ground for relief in the form of voluntary departure. However, Defendant has failed to satisfy the requirements of Section 1326(d) because he has not shown prejudice.

Section 1326(d) establishes a three-part test that an alien must meet in order to attack collaterally the validity of a deportation order relied upon in a criminal prosecution. An alien must show that

> 1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> 2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> 3) the entry of the order was fundamentally unfair.

Defendant argues that he is exempt from the exhaustion requirement because his waiver of his right to appeal did not comport with due process. However, even assuming for the sake of argument that

Defendant can show that he is exempt from the exhaustion requirement and was denied an opportunity to seek judicial review, Defendant cannot satisfy the third prong of 8 U.S.C. § 1326(d): that the entry of the deportation order was fundamentally unfair. This Court can "determine that the removal order was 'fundamentally unfair' under Section 1326(d)(3) and dismiss the indictment only if [Defendant] can show that he suffered prejudice as a result." Pallares-Gallan, 359 F.3d at 1103 (citing United States v. Leon-Paz, 340 F.3d 1003, 1007 (9th Cir. 2003)); Zarate-Martinez, 133 F.3d at 1199 (finding alien who was not eligible for relief from removal under Section 240A suffered no prejudice even though his appellate waiver was defective).

An alien bears the burden of proving prejudice. See United States v. Proa-Tovar, 975 F.3d 592, 595 (9th Cir. 1992) (en banc) ("A defendant who seeks to exclude evidence of a deportation order in a prosecution under 8 U.S.C. § 1326 must do more than demonstrate deprivation of the right to a direct appeal from that order. The defendant also bears the burden of proving prejudice."); see also United States v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000). To show prejudice, the alien must demonstrate that he had "plausible grounds for relief from deportation." United States v. Arce-Hernandez, 163 F.3d 559, 563 (9th Cir. 1998). It is not enough to show that a procedural requirement was not complied with, or that an alien would have availed himself of missing procedural protections; the alien must "produce some concrete evidence indicating that the violation of a procedural protection actually had the potential for affecting the outcome of his or her deportation proceedings." United States v. Cerda-Pena, 799 F.2d 1374, 1379 (9th Cir. 1986); see also United States v. Alvarado-Delgado, 98 F.3d 492, 493 (9th Cir. 1996).

Defendant cannot, as a matter of law, establish prejudice in this case. The reason is because he was not a person of good moral character in the five years prior to November 5, 1996, when Defendant would have had to submit his application for voluntary departure. See 8 U.S.C. Section 1254(e) (person may receive voluntary departure if he is a person of good moral character for five years preceding application for voluntary departure). A person is of good moral character if he is not confined to a penal institution for an aggregate period of 180 days. See 8 U.S.C. Section 1101(f)(7). In this case, Defendant was sentenced to 2 counts of violation of Cal. Penal Code Section 261.5(c), for which he was sentenced to 180 days on one count, and 170 days on the other count, with custody to run "consecutively." See July 9, 1996 Judgment and Commitment Documents, attached hereto as Exhibit A. Thus, Defendant, who was not of good moral character.

Defendant concedes that a person lacking good moral character is ineligible for voluntary departure, but nevertheless argues that the rule is inapplicable here because his 1996 conviction documents do not establish that he was actually "confined" to a penal institution for 180 days. This argument is speculative, because there is no evidence that he served less than 180 days, and therefore Defendant does not have a "plausible" basis for asserting that he has met the good moral character requirement. Indeed, Defendant was sentenced to consecutive terms of 180 and 170 days. See Exhibit A. Moreover, his conviction documents establish that Defendant already had served 114 days when he was sentenced on July 9, 1996. Id. Since Defendant presumably remained in custody for another 122 days until his deportation on November 5, 1996 – and there is no showing otherwise by Defendant – Defendant must have served a period of confinement that far exceeded 180 days, which disqualified him from voluntary departure. Thus, because Defendant was not eligible for voluntary departure, he cannot establish prejudice as a result of the immigration court's alleged procedural errors. Defendant deportation motion should be denied.

III

CONCLUSION

The Government respectfully requests that the Court deny Defendant's motion to dismiss the indictment for the reasons stated above.

DATED: August 14, 2008

Respectfully submitted,
KAREN P. HEWITT
United States Attorney

/s/ Steven De Salvo

STEVEN DE SALVO
Assistant U.S. Attorney

UNTIED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MIGUEL ALVAREZ-MESA, Defendant.	Criminal Case No. 08CR0246-JM CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that:

I, Steven De Salvo, am a citizen of the United States over the age of 18 years and a resident of San Diego County, California; my business address is 880 Front Street, Room 6293 San Diego, California 92101-8800; I am not a party to the above-entitled action, I filed **UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S DEPORTATION MOTION** by filing it through the ECF system and causing notification to defense counsel by email to the following:

Kurt David Hermansen

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 14, 2008

/s/ Steven De Salvo
Steven De Salvo